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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 496

MICHAEL GALGANO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 497

ANTHONY CARMINATI AND WILLIAM MCKENNEY, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Pet. App. 15–26)[1] is not reported.

[1] References are to the petition and record in No. 496 unless otherwise noted. "R. I" refers to the petitioner's appendix and "R. II" refers to the appendix for the United States in the Court of Appeals.

JURISDICTION

The judgments of the Court of Appeals were rendered on August 23, 1957. The petitions for writs of certiorari were filed on September 23, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

In No. 497:

1. Whether the government proved a single conspiracy in which petitioners participated.

2. Whether the district court erred in various rulings during the trial.

In No. 496:

3. Whether admissions of petitioner Galgano to a witness had to be and were corroborated; and whether physical evidence introduced against him was relevant.

STATEMENT

Petitioners were convicted in the United States District Court for the Southern District of New York of conspiracy to sell heroin in violation of the federal narcotic laws (R. I, 6, 17–19). Galgano, the petitioner in No. 496, and Carminati, one of the petitioners in No. 497, were each sentenced to imprisonment for ten years, and McKenney to imprisonment for five years (R. I, 7–9). On appeal, the judgments were affirmed.

Michael Botto, a government witness and co-defendant in the indictment, testified that in 1955 and 1956 he, Ralph Russano, and petitioner McKenney dealt in heroin together (R. II, 31–37). Botto testified that during this time he received supplies of heroin from

Russano (R. II, 26). In October 1955, when Botto complained to Ralph Russano about the quality of heroin supplied to him, Ralph said that if Botto was willing to pay more money, (Russano) could get better stuff from "Black Mike" (identified by the witness in court as Galgano) (R. I, 24–26). A few days later, Botto told Galgano he was paying $400 an ounce for the "stuff" Ralph said he was getting from Galgano, and Galgano told him that "when he gave the stuff to Ralph the stuff was all right" (R. I, 29).[2]

Botto received deliveries of narcotics from Ralph Russano in a glassine bag inside a bank envelope (R. I, 26). When Galgano was arrested at his home on November 19, 1956, ten empty Bankers Trust Company envelopes were found on a table in Galgano's living room (R. I, 35–37).[3]

Ralph Russano and Salvatore Russano (his father) also supplied narcotics to government witness Ogelsby in 1955 and 1956 (R. II, 14). In October 1955, in a bar, Ogelsby overheard Ralph say something to three unknown men about three ounces of heroin. Russano made a phone call. Soon afterward another man appeared, talked to Russano and the three men, and then they all left (R. II, 4–6). Several nights later the same three men appeared again. They talked with Russano and he made another phone call. In a short while a man whom Ogelsby identified as Carminati

[2] This testimony was admitted only against Galgano (R. I, 29).

[3] Other conspirators were shown to have used the same type of bank envelopes for narcotics (R. II, 62–63).

appeared, and at one point said "Three the night before and seven tonight? What is happening to those guys?" (R. 7–9). In December 1955, Ogelsby, when told by Ralph that he would have to be satisfied with seven ounces of "cut heroin", refused to take it (R. II, 15). After Ralph made a telephone call, Carminati came in and told Ogelsby "I am sorry, big boy, but you will have to take seven ounces of cut stuff, which is the best we can do."

Arrangements were made in August 1955 or 1956 for Ralph to make a delivery of heroin to Ogelsby; but, because Ralph was unable to make the appointment, McKenney made the delivery (R. II, 19–22). In the same month, Sal Russano, in the presence of McKenney, said that he, Sal, would have to let matters cool for a while, but that in the meantime McKenney would take care of things (R. II, 18–19).

ARGUMENT

1. The petitioners in No. 497, Carminati and McKenney, contend that the proof offered by the government showed only separable and unrelated transactions, and falls short of showing a conspiracy implicating them in a scheme to receive, possess, and sell heroin. On the facts proved, however, the jury was justified in finding a single conspiracy to buy and sell heroin for profit. It involved two suppliers (Carminati and Galgano) who sold to a group of middlemen (Ralph and Sal Russano and McKenney) for the purpose of resale, with the middlemen in turn selling to retailers (Botto, Ogelsby, and others) for the purpose of resale to various consumers. There

was ample evidence to show that Carminati and Galgano supplied the Russanos with heroin on more than one occasion realizing that the heroin would be resold by the Russanos. And there was sufficient evidence to show that petitioner McKenney actively participated with the Russanos in their sales of heroin. (See the Statement, *supra*.) Each of the conspirators knew that he was part of a larger venture in which others were contributing to a common end. The case therefore falls within the pattern of *Blumenthal* v. *United States*, 332 U. S. 539, rather than *Kotteakos* v. *United States*, 328 U. S. 750, on which petitioners rely. See also *United States* v. *Tramaglino*, 197 F. 2d 928 (C. A. 2), certiorari denied, 344 U. S. 864, involving a conspiracy much like the one here shown.

2. The allegations of trial error by the petitioners in No. 497 are without substance.

A. They contend that their cross-examination of two government witnesses, Ogelsby and Schwartz, was improperly curtailed when the witnesses, at the request of the government, were excused from giving their addresses (R. II, 23–25, 57). Ogelsby, however, was asked and did give on cross-examination his address at the time of his arrest, which was the only address in which counsel expressed an interest (R. II, 25).

Schwartz, a co-defendant, testified as to purchases from Rich (a customer of the Russanos), and did not in his testimony implicate any of the petitioners. He was not required to give his exact address, but he did testify that he lived with his parents in the Bronx; gave details of his past and present employment; revealed that he pleaded guilty and was await-

ing sentence in the present case; that he had never been an informer or witness for any prosecutor in a criminal case; that he had no previous criminal record, and that he did not use narcotics (R. II, 57–59; Pet. App. 29). Moreover, Schwartz' exact address was revealed upon cross-examination of the very next government witness, John Doyle (R. II, 60).

B. During the direct examination of Michael Botto, the government's attorney asked him whether, after his arrest, he had talked to Frank Rich at West Street. Botto replied that he had talked to Rich. Then Botto went on to say that Rich told him that Tony Carminati was Ralph Russano's connection. Defense counsel objected and the court struck the testimony from the record (Pet. 14). Petitioner Carminati and McKenney insist that the receipt of such evidence was error which could not be eradicated by striking it from the record and instructing the jury to disregard it. The trial court's prompt action was sufficient to overcome any prejudice that might have resulted from Botto's response. It is presumed that a jury follows instructions. *Delli Paoli* v. *United States*, 352 U. S. 232; *Opper* v. *United States*, 348 U. S. 84.

C. Petitioners also assert that it was error to permit Ogelsby to testify to overhearing conversations among Russano and three unidentified men in a bar (see the Statement, *supra*, pp. 3–4). Carminati was shown to have appeared on the scene following the second conversation under circumstances suggesting that the first was part of a general pattern. The testimony was, therefore, properly admitted as showing the nature of the conspiracy.

D. Carminati and McKenney contend that the court erred when it charged that "[p]ossession of any sort—either actual or constructive—is sufficient to raise the presumption" (R. I, 79) of guilt under 21 U. S. C. 174. The charge was correct. *United States* v. *Cohen*, 124 F. 2d 164 (C. A. 2), certiorari denied, *sub nom. Bernstein* v. *United States*, 315 U. S. 811, rehearing denied, 316 U. S. 707. And in any event it dealt with the substantive count against another defendant.

E. In discussing Ogelsby's testimony implicating petitioner Carminati, the court, in its charge, stated that one of the persons with whom Ogelsby dealt in heroin was the man "whom he identified in this courtroom as the defendant Anthony Carminati" (R. I, 68). Petitioners argue that Ogelsby's identification was at best equivocal and that it was therefore error to charge as the court did.

When asked if defendant Carminati was the man with whom he dealt, Ogelsby replied:

> * * * looks exactly like him (R. II, 22)

and further:

> Q. Are you sure that this is the man that you saw on those occasions? A. As far as I know, yes.
>
> Q. There is no doubt in your mind about that, is that right? A. That is right. [R. II, 22.]

In the light of this testimony, the court's charge was fully justified.

F. Petitioners cite as error the court's refusal to read the full set of trial notes to the jury. The court did not, as petitioners charge, refuse the request

of the jury. Emphasizing that the trial record contained four or five hundred pages, the court asked the jury if they would specify the portions of testimony they wanted repeated (R. I, 96). The jury did this and following their request the court had the designated portions read aloud (R. I, 96–100).

3. There is no merit in the argument of petitioner Galgano in No. 496 that the admission by him to Botto that he was supplying narcotics to Russano was not corroborated as required by *Opper* v. *United States*, 348 U. S. 84.

A. Galgano's admission was made while the conspiracy was still in progress, not after the crime had been completed. As such it did not require corroboration. *Warzower* v. *United States*, 312 U. S. 342, 347.

Moreover, as the court below pointed out (Pet. App. 22–23), the admission was corroborated by Russano's statements to Botto, in furtherance of the conspiracy, that he got good quality heroin at a higher price from Galgano.

B. Petitioner Galgano also contends that the 10 paper envelopes (Government Exhibit 33) were inadmissible because they bore no relation to the trial and substantially prejudiced him. Similar envelopes had been introduced into evidence against other conspirators by the government (Government Exhibits 7 and 18). It was shown by the government that these envelopes were used by the conspirators to deliver heroin (R. I, 27, 35; R. II, 62–63). Identical envelopes found in Galgano's home would be some evidence of his

participation in narcotic transactions. Thus, these envelopes were relevant and were properly admitted.

CONCLUSION

It is respectfully submitted that the petitions for writs of certiorari should be denied.

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